

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAUN JOSEPH BERGHOLTZ,

Defendant and Appellant.

C060050

(Super. Ct. Nos.
CM021964 and CM026520)

This appeal concerns defendant's sentence and the imposition of certain fines and fees. In case No. CM021964, defendant Shaun Joseph Bergholtz pleaded no contest to driving with a blood alcohol content of .08 percent causing injury (Veh. Code, § 23153, subd. (b)) and leaving the scene of an accident (*id.*, § 20001, subd. (a)). He also admitted causing bodily injury to more than one victim (*id.*, § 23558) and proximately causing great bodily injury to one victim (Pen. Code, § 12022.7,

subd. (a)). Defendant was placed on five years formal probation on the condition, among others, he serve 90 days in jail. The trial court imposed various fines and fees, including: a \$400 restitution fine (\$200 for each count) (Pen. Code, § 1202.4, subd. (b)); \$17,179.38 in victim restitution (\$3,281.60 to Robert Mallow, \$2,666.50 to Bessie Payne, and \$11,231.28 to PG&E) (*id.*, § 1202.4, subd. (a)); a \$20 court security fee (*id.*, § 1465.8); a \$1,365 fine on the DUI count, consisting of a \$390 base fine (Veh. Code, § 23554), a \$78 court surcharge (Pen. Code, § 1465.7), a \$195 state court construction penalty (Gov. Code, § 70372), a \$390 state penalty (Pen. Code, § 1464), a \$273 county penalty (*id.*, § 76000), and a \$39 DNA penalty assessment (Gov. Code, § 76104.6).

Approximately two years later, while defendant was still on probation in the DUI case, he pleaded no contest to child endangerment (Pen. Code, § 273a, subd. (a)) in case No. CM026520. He was placed on four years formal probation on the condition, among others, he serve 365 days in jail and enroll in a child abuse treatment program. The trial court imposed various fines and fees, including a \$200 restitution fine; a \$20 court security fee; and a \$3,620 child abuse prevention fine, consisting of a \$1,000 base fine, a \$200 court surcharge, a \$500 state court construction penalty, a \$1,000 state penalty, a \$700 county penalty, two \$100 DNA penalty assessments (Gov. Code, §§ 76014.6, 76104.7), and a \$20 collection fee (Pen. Code, § 294, subd. (d).) The court also found defendant violated the terms of his probation in the DUI case and revoked and reinstated his

probation with the additional condition that he serve 365 days in jail, concurrent with his sentence in the child endangerment case.

One year later, defendant admitted violating the terms of his probation in both the DUI and child endangerment cases. His probation was revoked, and on September 23, 2008, he was sentenced to an aggregate term of nine years in state prison. In the DUI case, defendant was sentenced to two years for driving with a blood alcohol content of .08 percent causing injury, plus two years for the Vehicle Code section 23558 enhancement and three years for the Penal Code section 12022.7 enhancement; and a consecutive eight months (one-third the middle term) for leaving the scene of an accident. He was sentenced to a consecutive 16 months for child endangerment. In the DUI case, the court confirmed its prior imposition of victim restitution, albeit in the wrong amounts;¹ a \$390 base DUI fine, a \$78 court surcharge, a \$195 state court construction penalty, a \$390 state penalty assessment, a \$39 DNA penalty assessment, and a \$273 county penalty assessment. In addition, the court imposed a \$200 restitution fine; a parole revocation

¹ Inexplicably, the trial court indicated that victim restitution was awarded as follows: \$3,281 to Mallow; \$2,666 to Payne; and \$11,231.88 to PG&E. These amounts are reflected in the amended abstract of judgment filed February 24, 2008. The record, however, reflects that the victims sought and were awarded the following: \$3,281.60 to Mallow, \$2,666.50 to Payne, and \$11,231.28 to PG&E. We shall direct the trial court to correct the abstract of judgment to reflect the correct amounts.

fine in the same amount, stayed pending successful completion of parole (*id.*, § 1202.45); a \$40 court security fee (\$20 for each offense) (*id.*, § 1465.8); and a second \$39 DNA penalty assessment (Gov. Code, § 76104.7). In the child endangerment case, the court confirmed its prior imposition of a \$200 restitution fine; a \$20 court security fee, and a \$3,620 child abuse prevention fine, consisting of a \$1,000 child abuse restitution fine, a \$200 court surcharge, a \$500 state court construction penalty, a \$1,000 state penalty assessment, a \$700 county penalty assessment, two \$100 DNA penalty assessments, and a \$20 collection fee.² In addition, the court imposed a parole revocation fine in the same amount, stayed pending successful completion of parole.

Defendant appeals, contending (1) the two year enhancement imposed pursuant to Vehicle Code section 23558 must be reduced to one year because he injured two people and the statute provides for an "enhancement of one year . . . for each additional injured victim," and not each victim; (2) imposition

² The amended abstract of judgment filed February 24, 2008, incorrectly reflects that both the DNA penalty assessments imposed in the DUI and child endangerment cases were imposed pursuant to Government Code section 76104.6. According to the court's minutes, the first DNA penalty assessment imposed in each case was imposed pursuant to Government Code section 76104.6, while the second was imposed pursuant to Government Code section 76104.7. We shall direct the trial court to amend the abstract of judgment to reflect that the second DNA penalty assessment imposed in the child endangerment case was imposed pursuant to Government Code section 76104.7. As discussed below, we shall strike the DNA penalty assessments imposed in the DUI case.

of the DNA penalty assessments in the DUI case violated state and federal prohibitions against ex post facto laws; and (3) the trial court erred in calculating the state court construction penalties imposed under Government Code section 70372 and the county penalty assessments imposed under Government Code section 76000. The People concede the two year enhancement imposed pursuant to Vehicle Code section 23558 must be reduced to one year, and the DNA penalty assessments imposed in the DUI case must be stricken. The People assert, however, that defendant forfeited his right to challenge the court's calculation of the state court construction penalty and the county penalty assessment by failing to object to the amounts imposed below, and in any case, defendant failed to establish the amounts imposed were excessive. We shall reduce the two year enhancement imposed pursuant to Vehicle Code section 23558 to one year, strike the DNA penalty assessments imposed in the DUI case, and reduce the penalties imposed under Government Code sections 76000 and 70372 as urged by defendant. In addition, we shall strike the \$200 restitution fine imposed in the DUI case on September 23, 2008, and direct the trial court to amend the abstract of judgment to increase the restitution and parole revocation fines imposed in that case to \$400. We shall further direct the trial court to amend the abstract of judgment to reflect that the second DNA penalty assessment imposed in the child endangerment case was imposed pursuant to Government Code section 76104.7. We shall affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND³

The issues raised on appeal render a detailed recitation of the facts of the underlying offenses unnecessary. Suffice it to say that on September 26, 2004, defendant failed to stop at a stop sign and collided with a truck driven by Robert Mallow. The truck slid off the road and struck a utility pole. Defendant fled the scene, while Mallow and his passenger Bessie Payne were taken to Oroville Medical Center. Mallow suffered two broken ribs and complained of pain in his neck and back. Payne had a laceration on her lip, multiple lacerations to her left foot and leg, and numerous contusions to her legs. She also complained of pain in her pelvis and her entire left side.

Defendant was located in Oroville Medical Center's emergency room shortly after the collision. He admitted splitting a "12-pack" of beer with a friend a few hours before the accident. His blood alcohol level was .12 percent.

On March 13, 2007, officers conducted a probation search of defendant's residence, where he lived with his four children. The residence was filthy, infested with cockroaches, and had a "horrible stench." On the floor there were pellets used to kill

³ In entering his no contest pleas, defendant stipulated that "there is a factual basis" for his pleas and that "the court may take facts from probation reports . . . as deemed necessary to establish the factual basis." Accordingly, the facts set forth herein are taken from the probation reports.

rats and numerous extension cords running across the floor and hanging from the ceiling.

DISCUSSION

I.

The Two Year Enhancement Imposed Pursuant To Vehicle Code Section 23558 Must Be Reduced To One Year

Defendant contends the two year enhancement imposed pursuant to Vehicle Code section 23558 must be reduced to one year because he injured two people and the statute provides for an "enhancement of one year . . . for each *additional* injured victim." (Italics added.) The People agree, and so do we.

Vehicle Code section 23558 provides in pertinent part: "A person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 of this code . . . shall, upon a felony conviction . . . receive an enhancement of one year in the state prison for each additional injured victim."

"In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) By including the term "additional," the Legislature plainly intended the enhancement not be imposed for the first victim, but on each *additional* victim. As the People correctly note, "Mallow and Payne were the only victims involved in [the DUI case]. As such, there were only two total victims, meaning there was only one 'additional' victim pursuant to [Vehicle

Code] section 23558." We shall reduce the enhancement imposed pursuant to Vehicle Code section 23558 to one year.

II.

The DNA Penalty Assessments Imposed In The DUI Case Must Be Stricken

Defendant contends that imposition of the two \$39 DNA penalty assessments pursuant to Government Code sections 76104.6. and 76104.7 in the DUI case violated state and federal prohibitions against ex post facto laws because those crimes were committed before the effective date of the statutes. The People agree, and so do we.

The ex post facto clauses of the federal and state Constitutions prohibit certain categories of legislation, including laws ""which make[] more burdensome the punishment for a crime, after its commission"" (*People v. McVickers* (1992) 4 Cal.4th 81, 84 (*McVickers*); see U.S. Const., art. 1, § 10, cl. 1 and Cal. Const., art. 1, § 9.) "[A] penalty assessment cannot be imposed without violating the constitutional prohibition of ex post facto laws if (1) the defendant's criminal act preceded its enactment; and (2) the assessment is in fact a penalty." (*People v. Batman* (2008) 159 Cal.App.4th 587, 590 (*Batman*).) "The clause thus protects defendants from retrospective legislation with a punitive effect or purpose." (*McVickers, supra*, 4 Cal.4th at p. 85.)

Under ex post facto principles, the amount of a fine is determined as of the date of the offense. (See *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

In *Batman, supra*, 159 Cal.App.4th at page 591, we held that imposition of DNA penalty assessments under Government Code section 76104.6 for crimes committed before the effective date of the statute violates the state and federal constitutional prohibitions against ex post facto laws. The reasoning supporting our determination as to Government Code section 76104.6 -- the assessment was denominated a "penalty," was calculated in proportion to criminal culpability (i.e., based on the amount of the fine imposed), and was collected using the provision for collecting the state penalty assessment -- leads to a similar conclusion as to Government Code section 76104.7 insofar as it, too, is denominated a "penalty," calculated in proportion to criminal culpability, and collected using the provision for collecting the state penalty assessment. (See *id.* at pp. 590-591; Gov. Code, § 76104.7, subd. (a).)

The DNA penalty assessment set forth in Government Code section 76104.6 was added by Proposition 69, a measure approved by the voters on November 2, 2004. (See 37A pt. 2 West's Ann. Gov. Code (2005 ed.) foll. § 76104.6, p. 114.) That measure took effect the day after the election, on November 3. (See Cal. Const., art. II, § 10, subd. (a).) The DNA penalty assessment set forth in Government Code section 76104.7 was enacted in 2006. (Stats. 2006, ch. 69, § 18, eff. July 12, 2006).

Defendant's crimes in the DUI case were committed on September 26, 2004, and thus, preceded the enactment of Government Code sections 76104.6 and 76104.7. Thus, imposition

of the DNA penalty assessments for those crimes violated state and federal prohibitions against ex post facto laws. Accordingly, the DNA penalty assessments imposed in the DUI case must be stricken.

III.

The Penalties Imposed Under Government Code Sections

70372 And 76000 Must Be Reduced

Defendant contends the trial court erred in calculating the state court construction penalties imposed under Government Code section 70372 and the county penalties imposed under Government Code section 76000. We agree.

As a preliminary matter, the People's assertion that defendant forfeited his right to challenge the trial court's calculation of these penalties by failing to object below lacks merit. As we shall explain, the amount of the penalties imposed varied from the amount prescribed by the statutes; thus, the error is jurisdictional, and the issue may be raised for the first time on appeal. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1369.)

Turning to the merits, Government Code section 70372 imposes a state court construction penalty "in the amount of five dollars (\$5) for every ten dollars (\$ 10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses," except for any restitution fine, any penalty authorized by Penal Code section 1464 or Chapter 12 (commencing with Section 76000) of Title 8, certain parking offenses, and the state surcharge

authorized by Penal Code section 1465.7. (Gov. Code, § 70372, subd. (a); see also *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251-1254 (*McCoy*).) As explained in *McCoy*, a state court construction penalty of \$5 for every \$10 collected on the \$50 crime laboratory fee, i.e., \$25, should be assessed. As also explained in *McCoy*, however, that \$25 penalty should be reduced under Government Code section 70375, subdivision (b). (*Id.* at pp. 1252-1254.) At the time defendant was sentenced, that section "require[d] that the \$5 court construction penalty be reduced by the amount the local board of supervisors direct[ed] be paid from the [Government Code] section 76000, subdivision (a) penalty assessment into the [Government Code] section 76100 local courthouse construction fund. As noted, the Los Angeles County Board of Supervisors has directed that \$2 of the [Government Code] section 76000, subdivision (a) penalty assessment be paid into the [Government Code] section 76000 local courthouse construction fund. Therefore, in Los Angeles County, every convicted felon must pay on a Health and Safety Code section 11372.5, subdivision (a) laboratory fee a \$3 state court construction penalty on every \$10 of the fee, which is statutorily designated as a fine."⁴ (*Id.* at p. 1254.)

⁴ Government Code section 70375, subdivision (b), identifies circumstances where the \$5 state court construction penalty on every \$10 of a fine is reduced. At the time defendant was sentenced, "[i]n each county, the . . . amount authorized by [Government Code s]ection 70372 shall be reduced by the following: [¶] (1) The amount collected for deposit into the local courthouse construction fund established pursuant to

The amount collected by each county for deposit into the local courthouse construction fund established under Government Code section 76100 can be determined from the table included in Government Code section 76000, subdivision (e). That table specifies for each county that amount of the penalty assessment of \$7 on \$10 of every fine the local board of supervisors has allocated for purposes other than courthouse construction. (Gov. Code, § 76000, subd. (e); see also *McCoy, supra*, 156 Cal.App.4th at p. 1254.) In Butte County, the amount is \$6. (Gov. Code, § 76000, subd. (e).) The difference obtained by subtracting \$6.00 from \$7.00 is \$1.00, the amount collected by Butte County for deposit into the local courthouse construction fund established under Government Code section 76100. (See *McCoy, supra*, 156 Cal.App.4th at p. 1254.) This difference, \$1.00, reduces the rate of the state court construction penalty in Butte County from \$5 per \$10 of the fine to \$4 per \$10 of the fine. (*Ibid.*) Hence, the state court construction penalty applicable to a \$390 DUI fee is \$156 (39 times \$4), and the state court construction penalty application to a \$1,000 child abuse restitution fine is \$400 (100 times \$4).

Government Code section 76000, subdivision (a) imposes an "additional penalty in the amount of seven dollars (\$7) for

[Government Code s]ection 76100. . . . [¶] (2) The amount collected for transmission to the state for inclusion in the Transitional State Court Facilities Construction Fund established pursuant to [Government Code s]ection 70401 to the extent it is funded by money from the local courthouse construction fund." (Stats. 2007, ch. 302, § 3.)

every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses," with the same exceptions set forth in Government Code section 70372, subdivision (a). Pursuant to subdivision (e) of section 76000, the \$7 additional penalty "shall be reduced in each county by the additional penalty amount assessed by the county for the local courthouse construction fund established by Section 76100 as of January 1, 1998, when the money in that fund is transferred to the state under Section 70402. The amount each county shall charge as an additional penalty under this section shall be as follows: [¶] . . . Butte . . . \$6.00" Accordingly, in Butte County the penalty assessments under Government Code section 76000 are \$6 for every \$10. Hence, the county penalty applicable to a \$390 base DUI fine is \$234 (39 times \$6), and the county penalty applicable to a \$1,000 child abuse restitution fine is \$600 (100 times 6).

IV

*The \$200 Restitution Fine Imposed At Sentencing
Must Be Stricken And The Abstract Amended To Reflect
The \$400 Initially Imposed*

Finally, while not raised by the parties, we note that the court's imposition of a \$200 restitution fine in the DUI case at the September 23, 2008, sentencing was error. Penal Code section 1202.4, subdivision (b), requires the imposition of a restitution fine when a person is convicted of a felony, irrespective of any grant of probation. But where probation is

granted, the restitution fine survives a subsequent revocation of probation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 820.) Thus, imposition of a second, or duplicate, restitution fine upon revocation of probation is unauthorized and must be stricken, notwithstanding the absence of an objection at sentencing. (*Id.* at pp. 821-823; *People v. Arata* (2004) 118 Cal.App.4th 195, 201.) Accordingly, the \$200 restitution fine imposed in the DUI case on September 23, 2008, is stricken. We shall direct the trial court to amend the abstract of judgment to increase the restitution fine imposed in the DUI case to \$400. Since the corresponding parole revocation fine must be in the same amount as the restitution fine (Pen. Code, § 1202.45; *People v. Smith* (2001) 24 Cal.4th 849, 853), we will also direct the trial court to increase the parole revocation fine to \$400. Any party aggrieved by this procedure may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

The judgment is modified to (1) reduce defendant's sentence for the Vehicle Code section 23558 enhancement from two years to one year; (2) strike the \$39 DNA penalty assessments imposed under Government Code sections 76104.6 and 76104.7 in the DUI case (CM021964); (3) reduce the state court construction penalty imposed under Government Code section 70372 in the DUI case (CM021964) from \$195 to \$156, and in the child endangerment case (CM026520) from \$500 to \$400; (4) reduce the county penalty imposed under Government Code section 76000 in the DUI case (CM021964) from \$273 to 234, and in the child endangerment case

(CM026520) from \$700 to \$600; (5) strike the \$200 restitution fine imposed in the DUI case (CM021964) as the \$400 fine remains in force; and (6) increase the parole revocation fine imposed in the DUI case (CM021964) to \$400. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting these modifications, as well as the following two corrections: the second DNA penalty assessment imposed in the child endangerment case (CM026520) is pursuant to Government Code section 76104.7, and victim restitution was awarded as follows: \$3,281.60 to Robert Mallow, \$2,666.50 to Bessie Payne, and \$11,231.28 to PG&E. The court is further directed to forward a certified copy to the Department of Corrections and Rehabilitation.

We concur: BLEASE, Acting P. J.

RAYE, J.

CANTIL-SAKAUYE, J.